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The Comptroller General  
of the United States

Washington, D.C. 20548

# Decision

Matter of: The National Hispanic Association of Construction  
Enterprises  
File: B-231086  
Date: July 5, 1988

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## DIGEST

Federal Acquisition Regulation (FAR), deviation which precludes the use of individual sureties as security for bid, payment and performance bonds unless such individual sureties deposit adequate tangible assets with the government is not objectionable where the deviation was properly authorized under the FAR and is a temporary element of a pilot contracting program aimed at improving the efficiency of the agency's procurement efforts.

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## DECISION

The National Hispanic Association of Construction Enterprises and several Members of Congress on its behalf, request our opinion as to the legality of the deviation by the Department of the Navy from Federal Acquisition Regulation (FAR), § 28.201 (FAC 84-8) and FAR § 28.202-2 (1984 ed.). Specifically, the Association questions the Navy's prohibition of the use of individual sureties for bonding requirements imposed pursuant to the Miller Act, 40 U.S.C. § 270a et seq. (1982). The Association argues that this deviation from the FAR (which ordinarily permits the use of individual sureties), is impermissible because it is prohibited by the "Surety Act," 31 U.S.C. § 9301 et seq. (1982). For the reasons stated below, we find no reason to question the Navy's deviation.

As noted above, the Miller Act requires that performance and payment bonds be furnished by firms performing under construction contracts where the value of the contract exceeds \$25,000. 40 U.S.C. § 270a. FAR § 28.102 (FAC 84-26), implements the terms of the Miller Act and FAR subpart 28.2 (FAC 84-8), prescribes the government's requirements for

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security for bonds required thereunder. Of particular relevance for purposes of the Association's inquiry, FAR §§ 28.201 and 28.202-2 permit the use of individual sureties for purposes of providing adequate security for performance and payment bonds required under the Miller Act.

In August 1987, the Pacific Command of the Navy requested a class deviation from those provisions of the FAR described above (see FAR § 1.404 (FAC 84-6)). The basis for the request was the Pacific Command's view that the procedures to determine the acceptability of individual sureties are "time consuming, cumbersome and unreliable." The Command asserted that the contracting officer has no practical means of validating the net worth of the individual sureties, the number and amounts of other bonds utilizing the same individual as sureties, the continued acceptability of these individual sureties and the continued availability and value of the assets in the event of claims. The Command concluded that individual sureties do not provide an acceptable level of security and requested authority to exclude the use of individual sureties where appropriate. In its request, the Command also indicated that the requested deviation would not violate any statute or executive order. In September 1987, the Assistant Secretary of the Navy approved a class deviation permitting Naval contracting activities in the Command to preclude the use of individual sureties as security for bonding requirements. The deviation was granted until September 31, 1988, as part of a pilot program to enable contracting personnel to acquire supplies and services more quickly and easily.

The Navy subsequently issued two solicitations precluding the use of individual sureties which were the subject of bid protests by firms objecting to the prohibition against the use of individual sureties. Coliseum Construction, Inc., B-228597, Feb. 9, 1987, 67 Comp. Gen. \_\_\_\_\_, 88-1 CPD ¶ 128 and Service Alliance Systems, Inc., B-229655, Mar. 1, 1988, 88-1 CPD ¶ 211. In those decisions, we upheld solicitation provisions which, in accordance with the deviation from the FAR, precluded the use of individual sureties as security for bid, payment and performance bonds unless individuals desiring to act as sureties deposited adequate tangible assets with the government. We reached this result because the deviation properly was authorized under the FAR, and is a temporary element of a pilot contracting program aimed at improving the efficiency of the agency's procurement efforts. We specifically concluded that implementation of the deviation for the limited period authorized, during which the Navy is gathering information on its effect and effectiveness, is appropriate and will not be questioned by our Office. Service Alliance Systems, Inc., B-229655, supra. We did suggest that if the Navy plans to extend the

deviation past September 1988, it should propose an appropriate FAR revision to cover the matter pursuant to FAR § 1.404.

The Association argues that the deviation is legally impermissible because, under the FAR § 1.402 (FAC 84-6), deviations are improper where precluded by law, executive order or regulation. In this connection, the Association argues, contrary to the Navy's finding, that the deviation is not in accordance with law. In particular, the Association directs our attention to the "Surety Act," 31 U.S.C. § 9301 et seq. (1982), which in its opinion prohibits the exclusion of individual sureties as security for any bonding requirement imposed by law.

We disagree. In our opinion, the purpose of the "Surety Act" is to authorize the use of government obligations in lieu of other types of security (e.g., individual surety bonds). The statute, by its own terms, declares that, "[i]f a person is required under a law . . . to give a surety bond, the person may give a Government obligation as security instead of a surety bond." (Emphasis supplied.) 31 U.S.C. § 9303(a). That section also declares that the use of government obligations for security will have the same legal effect as the use of other types of security such as a certified check, bank draft, or personal bond. 31 U.S.C. § 9303(c). Simply stated, we think that the "Surety Act" was merely intended to provide authority for the acceptance of government obligations as security for a bond where, previously, no such authority existed. It does not require that the government permit use of individual sureties in soliciting supplies or services.

This interpretation is confirmed by an examination of the statutory predecessor to 31 U.S.C. § 9303. The "original version" of this section was contained in the Revenue Act of 1918, ch. 18, § 1320, 40 Stat. 1148. The legislative history accompanying this provision states, in essence, that Liberty-Loan Bonds could be used in lieu of other forms of security. See H.R. Rep. No. 767, 65th Cong. 2d Sess. 40 (1918); S. Rep. No. 617, 65th Cong., 3d Sess. 60 (1918). While the "Surety Act" recognizes that individual sureties are one form of providing security where requested by the government, our review of the act and other laws pertaining to suretyship does not support the Association's view that the deviation excluding individual sureties is prohibited by law. The Miller Act language, 40 U.S.C. § 270a, requires performance and payment bonds in certain circumstances "with a surety or sureties satisfactory to the officer awarding such contract." The form of surety is not specified and the language does not require any particular type of surety.

Instead, the type of surety required is left to the government's sound discretion. We therefore believe that the Navy's deviation is permissible and specifically does not violate 31 U.S.C. § 9301 et seq. See Coliseum Construction, B-228597, supra, and Service Alliance Systems, Inc., B-229655, supra.

*for Milton F. Jordan*  
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of the United States